IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT FITZ, Plaintiff, v. NORFOLK SOUTHERN RAILWAY COMPANY, Defendant.	CIVIL ACTION FILE NO. 1:09-CV-3462-RWS-WEJ

NON-FINAL REPORT AND RECOMMENDATION

Plaintiff, Robert Fitz, filed this action [1] through counsel on December 9, 2009, alleging race discrimination in violation of both Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII") and 42 U.S.C. § 1981, and a state law tort claim for intentional infliction of emotional distress ("IIED"). (See Compl. ¶¶ 34-63.) Now before the Court is defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Motion to Dismiss") [5]. For the reasons stated below, the Court **RECOMMENDS** that defendant's Motion to Dismiss be **GRANTED IN PART** and **DENIED IN PART**.

I. THE COMPLAINT[1]

Norfolk Southern Railway Company ("Norfolk Southern") hired plaintiff on November 12, 2008, and commenced his training as a Crew Dispatcher shortly thereafter. (Compl. ¶ 16.) During a January 2009 training session, a supervisory employee, Nancy Waitman, made racially derogatory comments to and about Mr. Fitz. (Id. ¶ 17.) Specifically, Ms. Waitman referred to plaintiff as "that new black boy" and called him "lazy" and "stupid." (Id. ¶ 18.) Another supervisory employee, Jean Ross, also called plaintiff "lazy" and "stupid" in another training session. (Id. ¶¶ 19-20.) When plaintiff protested, Ms. Ross pinched his lips closed and told him to "shut up." (Id. ¶ 21.)

Plaintiff reported these incidents to Mss. Waitman and Ross's supervisors (the "managers"). (Compl. ¶ 22.) The Director of Norfolk Southern's Atlanta Crew Management Center also became aware of plaintiff's complaints. (Id. ¶ 23.) When no action was taken, plaintiff filed several formal complaints with Norfolk

[1] In ruling on a motion to dismiss, all of the factual allegations in the complaint must be accepted and construed in the light most favorable to the plaintiff. Young Apts., Inc. v. Town of Jupiter, Fla., 529 F.3d 1027, 1037 (11th Cir. 2008); Beck v. Deloitte & Touche, 144 F.3d 732, 735 (11th Cir. 1998).

Southern's internal Equal Employment Opportunity ("EEO") department, beginning on May 7, 2009. (Id. ¶¶ 24-25, 28.)

Immediately after filing his internal complaint, the managers began scrutinizing plaintiff's job performance more closely than that of white Crew Dispatchers. (Compl. ¶¶ 26-27.) The increased scrutiny led to Mr. Fitz being disciplined for alleged mistakes, although white employees were not disciplined for the same or similar mistakes. (Id. ¶ 27.)

Plaintiff then filed a Charge of Discrimination with the EEOC and on September 10, 2009, received a Notice of Right to Sue. (Compl. ¶ 29.) Shortly after learning that the EEOC had issued a Notice of Right to Sue, Norfolk Southern suspended plaintiff for twenty days based on an unfounded allegation that he had violated company policy. (Id. ¶ 30.) The increased scrutiny continued upon plaintiff's return from suspension, leading to additional disciplinary actions and ultimately his termination on November 25, 2009. (Id. ¶¶ 32-33.)

II. MOTION TO DISMISS STANDARD

Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A motion to dismiss does not test the merits of a case, but only requires that "the plaintiff's

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factual allegations, when assumed to be true, 'must be enough to raise a right to relief above the speculative level.'" Mills v. Foremost Ins. Co., 511 F.3d 1300, 1303 (11th Cir. 2008) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007)). Absent allegations of fraud, all that is required of a plaintiff's complaint under Rule 8(a) is "a short and plain statement of the grounds for the court's jurisdiction," and "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(1)-(2). In ruling on a motion to dismiss, the factual allegations in the complaint must be accepted and construed in the light most favorable to the plaintiff. Young Apts., Inc., 529 F.3d at 1037.

For many years, the standard governing judicial review of a motion to dismiss was found in Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957), where the Supreme Court held that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 45-46, 78 S. Ct. at 102. However, in 2007, the Supreme Court abrogated that oft-quoted statement from Conley, rejecting the proposition that wholly conclusory statements in pleadings could preclude dismissal. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561, 127 S. Ct. 1955, 1968 (2007).

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The subsequent decision of Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937 (2009), summarized that new standard as follows:

> As the Court held in Twombly, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."
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> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"
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> Two working principles underlie our decision in Twombly. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation"). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to

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> dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"-"that the pleader is entitled to relief."
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at ___, 129 S. Ct. at 1949-50 (citations omitted).

The standard set forth in Twombly and summarized in Iqbal is "fast becoming the citation du jour in Rule 12(b)(6) cases." Smith v. Duffey, 576 F.3d 336, 339-40 (7th Cir. 2009).[2] However, that two-pronged approach[3] contains "few guidelines to

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[2] Indeed, as of February 25, 2010, Iqbal (decided on May 18, 2009) had been cited more than 5,900 times in case law alone, according to Westlaw.

[3] Defendant identifies the correct two-pronged approach in its brief. (Def.'s Mem. [5-2] 4.) In its Reply, however, defendant suggests that Iqbal set forth a three-pronged approach in which the Court first must identify the elements of each asserted cause of action. (Def.'s Reply [9] 4.) The proposed requirement that the Court consider each element of each cause of action is not supported by the numerous cases applying Twombly and Iqbal. The Court in Iqbal merely observed that the Twombly Court "found it necessary first to discuss the antitrust principles

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help the lower courts discern the difference between a plausible and an implausible claim and a conclusion from a detailed fact." Dobyns v. United States, ___ Fed. Cl. ___, 2010 WL 391510, at *8 (Fed. Cl. Feb. 1, 2010) (citation and internal quotations omitted). Thus, courts have reached "varying conclusions about whether notice pleading remains or has been supplanted by something new." Id. (citation omitted). Some courts have continued applying the Rule 8(a) pleading standard in forgiving terms, while others view Twombly and Iqbal "as having established a fundamentally-different, significantly-heightened pleading standard." Id. at *9 (citing cases).

The above-quoted language from Iqbal makes clear that the Supreme Court does not direct lower courts to abandon the "short and plain statement" standard of Rule 8. See Harrison v. Benchmark Electons. Huntsville, Inc., 593 F.3d 1206 (11th

implicated by the complaint," and began its own analysis by "taking note of the elements a plaintiff must plead to state a claim . . . ." Iqbal, 556 U.S. at ___, 129 S. Ct. at 1947. The Court then proceeded with its two-pronged analysis of the complaint. Id. at ___, 129 S. Ct. at 1949-51. This Court adopts that approach.

Cir. 2010) (applying Rule 8 "liberal pleading standard," citing Twombly and Iqbal).[4]

After its survey of recent case law, the court in Dobyns explained as follows:

> Twombly and Iqbal did more than repackage old notice-pleading standards in new terminology. In abrogating the "no set of facts" language from Conley, the Court plainly intended that Rule 8(a) be construed less hospitably–of a fashion that would not so readily unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. But, a review of these twin opinions, and the many cases decided in their aftermath, suggests that, properly construed, the impact of the new standards falls most heavily on . . . those few [cases] in which the rejected Conley language might otherwise have been salvific and those involving complex claims with multiple factual facets . . . .
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> [Thus], beyond the few specific changes they wrought, Twombly and Iqbal probably are best seen merely as restating, in slightly different terms, propositions long held. After all, the most lenient interpretations of Conley aside, it has never been the case that threadbare recitals of the elements of a cause of action, supported by mere conclusory statements were sufficient to state a claim. And, if this is true, it becomes important to recognize, then, what these cases do not hold. Mainly and specifically, they do not treat the newly-minted "plausibility" paradigm as altering the way in which courts should apply other long-standing pleading requirements. Thus, the Supreme Court did not, by requiring plausibility, transmogrify the "short and plain" pleading requirement of Rule 8 into a pedantical one that requires the extensive pleading of specific facts or every variation or corollary of a claim. Nor did the Court really alter how the

[4] A pin cite is not yet available in the Federal Reporter. See Harrison, 2010 WL 60091 at *6. Two other Eleventh Circuit decisions have applied the "facially plausible" standard without extensive discussion. See Waters Edge Living LLC v. RSUI Indem. Co., No. 08-16847, 2009 WL 4366031, at *3-4, 6 (11th Cir. Dec. 3, 2009); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260-61 (11th Cir. 2009).

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> presumption of truth accorded factual allegations has been applied for more than a half century–either in defining what is "factual" or in allowing courts more liberty to second-guess factual allegations in the guise of applying the new plausibility standard. In short, that these well-established rules were restated in the context of decisions that made other changes does not mean that they themselves were changed.

Dobyns, 2010 WL 391510, at *10-11 (footnotes, internal citations, and quotations omitted).

Similarly, the Seventh Circuit recently considered Twombly and Iqbal, explaining that Twombly

> held that in complex litigation (the case itself was an antitrust suit) the defendant is not to be put to the cost of pretrial discovery–a cost that in complex litigation can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak–unless the complaint says enough about the case to permit an inference that it may well have real merit.

Duffey, 576 F.3d at 340. The court in Duffey noted that Iqbal, too, was

> special in its own way, because the defendants had pleaded a defense of official immunity and the Court said that the promise of minimally intrusive discovery "provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties."

Id. (quoting Iqbal, 556 U.S. ___, 129 S. Ct. at 1954) (emphasis in Duffey).

Thus, the court in Duffey suggested, without deciding, that the pleading standards applied in Twombly and Iqbal might not weigh as heavily where the case is "not complex" and where, if the suit were "to survive dismissal and proceed to the summary judgment stage, it would be unlikely to place on the defendants a heavy burden of compliance with demands for pretrial discovery." Duffey, 576 F.3d at 340.

In sum, following Twombly and Iqbal, the Court analyzes motions to dismiss in the following manner. First, it must not perpetuate the "no set of facts" standard from Conley. A pleading that offers nothing more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555, 127 S. Ct. at 1955. Further, the Court should pay special attention to claims in complex litigation where mistaking conclusions for facts could lead to costly and unnecessary pretrial discovery. In all cases, however, the Court should disregard bare, unsubstantiated legal conclusions, and, applying its own judicial experience and common sense, determine whether the well-pleaded facts, taken as true, rise above the merely conceivable and plausibly suggest an entitlement to relief.

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III. DISCUSSION

Counts One through Six of the Complaint allege race discrimination in violation of both Title VII and § 1981. The test for intentional discrimination in suits under § 1981 is the same as the formulation used in Title VII cases. Ferrill v. Parker Group, 168 F.3d 468, 472 (11th Cir. 1999). Therefore, the Court applies the same analysis to plaintiff's Title VII and § 1981 claims.

A. Hostile Work Environment (Counts One and Two)

Plaintiff alleges that defendant's actions created a hostile work environment. A hostile environment claim analyzes a workplace environment as a whole to determine if it is "abusive," including the presence of severe or pervasive harassment based on a protected characteristic. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22, 114 S. Ct. 367, 371 (1993); Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).[5] Thus, to survive a motion to dismiss, the Complaint must contain

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[5] The severe or pervasive requirement has both subjective and objective components. Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999) Harassment is subjectively severe and pervasive if the complaining employee perceives the harassment as severe and pervasive. Id. Objective severity is analyzed in light of "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." Id.

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sufficient factual matter, accepted as true, that allows the court to draw a reasonable inference that plaintiff was subjected to severe or pervasive harassment based on his race. See Iqbal, 556 U.S. at __, 129 S. Ct. at 1949.

The Court begins its "analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth," including those that are bare or conclusory. Iqbal, 556 U.S. at __, 129 S. Ct. at 1951. Defendant contends that plaintiff's allegations that he was scrutinized and subjected to unfounded discipline are not factually supported and should be disregarded. (Def.'s Mem. 12-13, 15.)[6] The Court agrees that plaintiff's allegations of increased scrutiny are presented as bare assertions without factual enhancement, which the Court will not consider as supporting a hostile work environment claim. See Iqbal, 556 U.S. at __, 129 S. Ct. at 1951 ("To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature . . . that disentitles them

[6] Defendant's arguments primarily apply to the disparate treatment claim, but are incorporated in its discussion of hostile work environment. (See Def.'s Mem. 12-13, 15.) Specifically, defendant notes that there are no alleged facts describing how plaintiff was scrutinized, what mistakes plaintiff is alleged to have made, what discipline he received, or the names of white employees who received less scrutiny or discipline. (See id. at 12-13.)

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to the presumption of truth.").[7] Moreover, the Court will not consider plaintiff's suspension, because discrete acts such as suspension and termination are not considered in a hostile work environment claim. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115, 122 S. Ct. 2061, 2073 (2002); McCann v. Tillman, 526 F.3d 1370, 1378 (11th Cir. 2008).

The Court next considers the remaining factual allegations "to determine if they plausibly suggest an entitlement to relief." Iqbal, 556 U.S. at ___, 129 S. Ct. at 1951. As summarized above, plaintiff suffered verbal abuse during two training sessions when he was referred to as "that new black boy" and called "lazy" and "stupid." One manager pinched his lips closed and told him to "shut up."[8] Plaintiff complained to management, which took no action.

Courts applying Iqbal to motions to dismiss hostile work environment claims have reached differing conclusions on relatively similar allegations. Some have dismissed claims where the complaint did not sufficiently allege severe or pervasive workplace abuse.[9] Other courts have remained closer to the pre-Twombly pleading standards and allowed hostile work environment claims to proceed despite an apparent lack of sufficient factual allegations.[10]

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[7] Although no great speculation is required for the Court to imagine some vague level of increased scrutiny by supervisors, such speculation could not support the level of severe or pervasive harassment necessary to establish a hostile work environment. Thus, even if the Court were to consider the allegations as stated in plaintiff's Complaint, its conclusion would be the same.

[8] Although it is unclear whether that action was based on race, for purposes of the instant motion, the Court assumes that it was.

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[9] See Perkins v. U.S. Postal Serv., SA-09-CV-359-XR, 2010 WL 376383, at *3 (W.D. Tex. Jan. 26, 2010) (dismissing hostile work environment claim where plaintiff "does not establish in her complaint that the actions were objectively or subjectively severe or pervasive to constitute actionable harassment"); Badibanga v. Howard Univ. Hosp., ___ F. Supp. 2d ___, 2010 WL 177826, at *4 (D.D.C. Jan. 20, 2010) (dismissing allegations "insufficiently severe and pervasive to constitute an hostile work environment"); Krasner v. HSH Nordbank AG, ___ F. Supp. 2d ___, 2010 WL 86845, at *10 (S.D.N.Y. Jan. 7, 2010) (dismissing hostile work environment claim); Paris v. Faith Props., Inc., No. 4:08-CV-71 JVB, 2009 WL 4799736, at *4-5 (N.D. Ind. Dec. 8, 2009) (dismissing hostile work environment claim presenting "sufficient factual allegations to pass muster under Rule 8 and [Iqbal, but] . . . fail[ing] to state a claim upon which relief can be granted because the behavior she describes does not rise to the level of creating a hostile work environment under Title VII"); Lueck v. Progressive Ins., Inc., No. 09-CV-6174, 2009 WL 3429794, at *4 (W.D.N.Y. Oct. 19, 2009) (dismissing allegations insufficient to state claim that plaintiff's workplace was abusive or hostile within meaning of Title VII); Argeropoulos v. Exide Techs., No. 08-CV-3760, 2009 WL 2132443, at *5-6 (E.D.N.Y. July 8, 2009) (dismissing hostile work environment claim based on isolated incidents combined with conclusory, nonspecific allegation that such incidents were examples of "daily and continuous" conduct).

[10] See Myles v. A&L, Inc., No. 08-CV-205C, 2009 WL 4892098, at *3-4 (W.D.N.Y. Dec. 11, 2009) (denying motion to dismiss hostile work environment claim, relying on notice pleading practice); Slade v. Hershey Co., No. 1:09-cv-541, 2009 WL 4794067, at *3 (M.D. Pa. Dec. 8, 2009) (denying motion to dismiss hostile work environment claim where plaintiff alleged two-year span of false accusations based on race); Walker v. Meghani Med. P.C., No. 1:09cv596-WHA, 2009 WL

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Drawing on its judicial experience and common sense, as mandated by Iqbal, the Court finds that plaintiff's allegations fall well short of the level of severe or pervasive conduct that could alter the terms and conditions of his employment. See, e.g., Harris, 510 U.S. at 21, 114 S. Ct. at 370 ("'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to sufficiently significant degree to violate Title VII") (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1986)); McCann, 526 F.3d at 1379 ("Although offensive, such instances of racially derogatory language alone, extending over a period of more than two years, are too sporadic and isolated to establish that [alleged] conduct was so objectively severe or pervasive as to alter the terms and conditions of her employment."); Godoy v. Habersham County, 211 F. App'x 850, 853-54 (11th Cir. 2006) (finding no hostile work environment where plaintiff subjected to racial slurs "almost every shift" and battered by supervisor); Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 583 (11th Cir.

2590097, *1 (M.D. Ala. Aug. 19, 2009) (finding allegations of racially derogatory comments "sufficient to survive the motion to dismiss standard"); Nuesse v. Kline, No. 3:09 CV 329, 2009 WL 1850319, at *4 (N.D. Ohio June 26, 2009) (denying motion to dismiss hostile work environment claim where plaintiff alleged unwanted sexual advances, touching, and comments).

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2000) (ordinary workplace tribulations, such as sporadic abusive language, do not fall under Title VII's prohibition and do not turn statute into general civility code).

Moreover, it is unclear how discovery could change the Court's conclusion. The act of filing this action indicates with sufficient certainty that plaintiff subjectively perceived the conduct to be severe or pervasive. However, the alleged facts fail the objective standard. "The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" Reeves v. C.H. Robinson Worldwide, Inc., ___ F.3d ___, 2010 WL 174074, at *6 (11th Cir. 2010) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81, 118 S. Ct. 998, 1003 (1998)). Thus, at the time he filed his Complaint, plaintiff must have been aware of the facts supporting his hostile work environment claim. Nevertheless, plaintiff alleges only isolated incidents of a severity that numerous Courts have found insufficient as a matter of law, and he fails to allege that the conduct unreasonably interfered with his job performance. Given the impossibility of frequent, severe, abusive conduct directed at plaintiff of which he was unaware, discovery could not further his hostile work

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environment claims.[11] Accordingly, the undersigned **RECOMMENDS** that defendant's Motion to Dismiss be **GRANTED** as to Counts One and Two.

B. Retaliation (Counts Three and Four)

In Counts Three and Four, plaintiff alleges that defendant retaliated against him based on his race. To establish a prima facie retaliation case of retaliation, a plaintiff must show that (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) there is some causal relation between the two events. Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir.1998); Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1021 (11th Cir.1994). Norfolk Southern challenges the third element, arguing that plaintiff's retaliation claims "lack factual specificity and are nothing more than legal conclusions" and that "the Complaint provides no facts to show any link between the alleged discipline and the protected activity." (Def.'s Mem. 7-8.)

In contrast to his hostile work environment claims, the well-pleaded facts are sufficient to permit a reasonable inference that Norfolk Southern retaliated against

[11] Moreover, the Motion to Dismiss put plaintiff on notice that defendant challenged the factual sufficiency of his claims, and plaintiff did not take advantage of his right to amend his Complaint as a matter of course within 21 days of the filing of that motion. See Fed. R. Civ. P. 15(a)(1)(B).

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Mr. Fitz for his EEO complaints. To be sure, the Complaint includes bare legal conclusions that are not entitled to the assumption of truth. (See Compl. ¶¶ 43, 47 ("The actions of Defendant and its managerial and supervisory employees taken against Plaintiff were substantially motivated by his race and constitute unlawful retaliatory practices . . . .").) However, the remaining factual allegations plausibly suggest an entitlement to relief. To wit, plaintiff alleges that shortly after learning that the EEOC had issued a Notice of Right to Sue, Norfolk Southern suspended him for twenty days based on an unfounded allegation that he violated company policy. (Id. ¶ 30.)

That allegation, if proven, would potentially entitle plaintiff to relief. See Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004) ("A 'close temporal proximity' between the protected expression and an adverse action is sufficient circumstantial evidence of a causal connection for purposes of a prima facie case.") (citing Olmsted, 141 F.3d at 1460). Moreover, defendant's arguments, that plaintiff does not allege which managers knew about his EEO complaints, or when, are precisely the type of facts likely to be revealed through discovery.[12] Accordingly,

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[12] The cases defendant cites were not decided on motions to dismiss. (See Def.'s Mem. 7-10.)

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the undersigned **RECOMMENDS** that defendant's Motion to Dismiss be **DENIED** as to Counts Three and Four.

C. Disparate Treatment (Counts Five and Six)

In Counts Five and Six, plaintiff alleges disparate treatment based on his race. Disparate treatment may be proved by direct, circumstantial, or statistical evidence. Wright v. Southland Corp., 187 F.3d 1287, 1293 (11th Cir. 1999). The Complaint does not allege direct evidence of discriminatory disparate treatment and does not give any indication that plaintiff intends to produce statistical evidence. To make out a prima facie case of racial discrimination based on circumstantial evidence, plaintiff must show that (1) he belongs to a protected class; (2) he was qualified to do the job; (3) he was subjected to adverse employment action; and (4) his employer treated similarly situated employees outside his class more favorably. Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008). Defendant contends that plaintiff fails adequately to allege the fourth element, that he was treated less favorably than similarly situated employees who were not African American. (See Def.'s Mem. 11-13.)[13]

[13] The cases defendant cites were not decided on motions to dismiss. (Def.'s Mem. 11-13.) Defendant cites Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955 (11th Cir. 2008), in which the Eleventh Circuit affirmed the district court's

The Complaint does not identify any similarly situated comparator by name; nor does it detail the purported mistakes that led to the alleged disparate treatment. However, in a post-Twombly decision, the Supreme Court reaffirmed that under Rule 8, "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 2200 (2007) (citation and internal quotations omitted); see also Thomas v. Rhode Island, 542 F.3d 944, 948 (1st Cir. 2008) (same). Here, the well-pleaded facts are sufficient to permit a reasonable inference that plaintiff's claims have merit. The universe of potential comparators is limited to "white Crew Dispatchers" at the Atlanta Crew Dispatch Center. (Compl. ¶¶ 27-28, 32.) The Complaint further alleges "unfounded disciplinary actions against Plaintiff for which similarly situated white employees receive[d] no discipline." (Id. ¶ 32.) The Complaint specifies disciplinary actions, including suspension and termination. (Id. ¶¶ 30, 33.) Although a better pleading

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dismissal of a pattern or practice claim because the plaintiffs failed to prosecute that claim as a class action. 516 F.3d at 967-69. The district court entered summary judgment on the remaining claims. In its discussion, the Davis court recognized the plausibility standard in effect since Twombly and chastised both parties for pleadings that it suggested would cause the framers of the Federal Rules of Civil Procedure to "roll over in their graves." Id. at 974, 979.

would include factual allegations specific to the company policy that plaintiff is alleged to have violated, the Court necessarily finds that these allegations are more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." See Dobyns, 2010 WL 391510, at *9 ("the notice standard neither requires a claimant to 'plead facts establishing a prima facie case' nor to 'set forth all facts on which he relies to support his claim.'") (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511-13, 122 S. Ct. 992, 997-98 (2002)). Accordingly, the undersigned **RECOMMENDS** that defendant's Motion to Dismiss be **DENIED** as to Counts Five and Six.

D. IIED (Count Seven)

Plaintiff's IIED claim is clearly frivolous and should be dismissed. To establish an IIED claim, a plaintiff must show the following: (1) the defendant's conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) a causal connection between the wrongful conduct and the emotional distress; and (4) severe emotional distress. Bridges v. Winn-Dixie Atlanta, Inc., 335 S.E.2d 445, 447-48 (Ga. Ct. App. 1985). Plaintiff's burden on an IIED claim is "stringent." Id.

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Here, plaintiff's bare allegation of "grievous emotional distress, mental anguish, loss of income, humiliation, and other indignities" (Compl. ¶ 59), is not entitled to the assumption of truth. Iqbal, 556 U.S. at __, 129 S. Ct. at 1951. Further, plaintiff has not alleged conduct that comes close to the standard applied by Georgia courts. See, e.g., Witter v. Delta Airlines, Inc., 966 F. Supp. 1193, 1201 (N.D. Ga. 1997) (alleged symptoms of emotional distress including anxiety, sleeplessness, overeating, diarrhea, and headaches, while not minor, clearly not of the type that no reasonable man could be expected to endure), aff'd, 138 F.3d 1366 (11th Cir. 1998); Kaiser v. Tara Ford, Inc., 546 S.E.2d 861, 868 (Ga. Ct. App. 2001) (actionable conduct must be "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."); Kornegay v. Mundy, 379 S.E.2d 14, 16 (Ga. Ct. App. 1989) (finding tasteless and rude social conduct, such as insults, indignities, threats, and petty oppression, not actionable). Thus, plaintiff has not adequately alleged any severe emotional distress caused by any wrongful conduct. Accordingly, the undersigned **RECOMMENDS** that defendant's Motion to Dismiss be **GRANTED** as to Count Seven.

IV. CONCLUSION

For the reasons stated above, the undersigned **RECOMMENDS** that defendant's Motion to Dismiss [5] be **GRANTED IN PART** and **DENIED IN PART**. Specifically, plaintiff's Counts One, Two, and Seven should be dismissed, leaving Counts Three through Six for adjudication.

In his response, plaintiff urges the Court to sanction defendant and award plaintiff his costs in defending the instant Motion. (Pl.'s Br. [8] 23.) Given its recommendation that the Motion be granted in part, the Court necessarily finds that the Motion is not frivolous, and **RECOMMENDS** that plaintiff's request be **DENIED**.

SO RECOMMENDED, this 3rd day of March, 2010.

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

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(Rev.8/82)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT FITZ, Plaintiff, v. NORFOLK SOUTHERN RAILWAY COMPANY, Defendant.	CIVIL ACTION FILE NO. 1:09-CV-3462-RWS-WEJ

ORDER FOR SERVICE OF
NON-FINAL REPORT AND RECOMMENDATION

Let this Non-Final Report and Recommendation of the United States Magistrate Judge, made in accordance with 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72(b), and the Court's Local Rule 72.1B, be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the Non-Final Report and Recommendation within fourteen (14) days of the receipt of this Order. Should objections be filed, they shall specify with particularity the alleged error(s) made (including reference by page number to any transcripts if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the Non-Final Report and Recommendation may be adopted as the opinion and order of the District Court, and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983) (per curiam).

The Clerk is directed to submit the Non-Final Report and Recommendation with objections, if any, to the District Court after expiration of the above time period.

SO ORDERED, this 3rd day of March, 2010.

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

AO 72A
(Rev.8/82)